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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1588

CAROL VANCE, ET AL.,
Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,
Appellees.

and GEORGE E. MCCREA, ET AL.,
Appellants,

v.

KING ARTS THEATRE, INC.,
Appellee.

On Appeal From The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR THE APPELLEE

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INDEX

Page

Questions Presented 1

Statute Involved 3

Statement of the Case 5

Summary of the Argument 7

Argument:

1. Article 4667 (a) (3), Texas Revised Statutes, which authorizes an injunction against the exhibition and distribution of unidentified and unnamed films, magazines and books prior to a judicial determination of obscenity is unconstitutional under the First and Fourteenth Amendments. 14

2. Is the Texas Nuisance Statute [Article 4667 (a) (3), Vernon's Texas Civil Statutes] which authorizes an injunction against any premises, place or building for the commercial manufacturing, distribution or exhibition of obscene materials unconstitutional as a prior restraint under the First and Fourteenth Amendments because of procedural deficiencies? 27

3. Is such a state statute unconstitutional under the First and Fourteenth Amendments because it authorizes the entry of an injuction restraining the exhibition of unidentified films under a public nuisance doctrine and, therefore, authorizes the imposition of absolute liability in the form of criminal contempt for the exhibition of an obscene film? 46

4. Should *En banc* decision of the Fifth Circuit be affirmed that any statute which would authorize a one-year closure order against an establishment found to be a nuisance because of commercial obscenity, unless a penal bond of up to $5,000 is posted to insure against future violations of the nuisance laws is unconstitutional under the First and Fourteenth Amendments as applied to film exhibitors because the law authorizes the imposition of a prior restraint against the future exhibition of any film, whether obscene or not, upon a finding that obscene films have been exhibited in the past? .. 67

5. Appellee as the prevailing party is entitled to an award of attorneys' fees. 68

Conclusion 69

Appendix A-1

TABLE OF AUTHORITIES CITED

Cases

Page

Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 18,24,41

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 ..... 15, 16,28,32,38

Burke v. Kingsley Books, 208 Misc. 150, 142 N.Y.S. 2d 735 54

Butler v. Michigan, 352 U.S. 380 (1957) 19

Dewees, Ex parte, 210 S.W. 2d 145 45

Dexter v. Butler, 587 F.2d. 177 69

Ellwest Stereo Theaters, Inc., of Texas v. Byrd, et al., 472 F. Sup. 702 49

Fehlhaber v. North Carolina, 445 F. Supp., 130 (E.D. N. Carolina 1978) 23,24

Freedman v. Maryland, 380 U.S. 51 85 S. Ct. 734, ... 15, 16,17,20,26,28,34,38,39,40,41,59

Grove Press, Inc., v. Philadelphia, 418 Fed. 2d 82 40,47

Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 S.2d 480 (1974) 55,57

Hutto v. Finney, U.S. , 98 S.Ct. 2565, 57 L. Ed. 2d 522 (1978) 13,69

Hosken, Ex Parte, 480 S.W. 2d 18 45

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 57

Jodhor Cinema, Ltd. v. Sedita, 309 F. Supp. 868 68

Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974) 68

Kingsley Books v. Brown, 354 U.S. at 436, 77 S.Ct. 1325, ... 9, 15,16,17,19,21,25,28,30,31,38,40,41,43,54,56,59

Kois v. Wisconsin, 408 U.S. 229, 92 S. Ct. 2245 60

Ladoza Canning Corp. v. McKenzie, 370 S. 2d 1137, (Fla. Supreme Court 1979) 23

Locke v. State, 516 S.W. 2d 949 14,20,34,36,37,39

Lo-Jo Sales, Inc., v. New York, U.S. , 99 S. Ct. 2319 57

Marcus v. Search Warrant of Property, 367 U.S. 717, 81 S. Ct. 1708 40,54

McKinney v. Alabama, 424 U.S. 669, 96 S. Ct. 1189 17,18,19,20,28,54,59,63

Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 17,19,63,65

Moore v. State, 470 S.W. 2d 391 33,34,37,39

Near v. Minnesota, 283 U.S. 696, 51 S.Ct. 625 21,22,24,25,52,60

Nebraska Press Association, et al, v. Stuart, et al, 427 U.S. 539, 96 S. Ct. 2791 24,25,28,29,30,52

New Riveria Arts Theatre, et al, v. State of Tennessee ex rel Davis, 412 S.W. 2d 890..... 23,64

New York Times Co., v. United States, 403 U.S. 713 (1971) 24

News Mart, Inc., v. State ex rel Webster, 561 S.W. 2d, 752 (1978)..... 23,64

Oregon Book Mart Corporation v. Schrunk, et al, 321 F. Supp. 639..... 68

Paris Adult Theatre v. Slaton, 413 U.S. 48, 93 S. Ct. 2628.....16,17,21,28,38

Parish of Jefferson v. Bayou Landing, Ltd., 350 S. 2d 158 (La. 1977) 23

Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454 (1907) 24

People ex rel Busch v. Projection Room Theater, 550 P. 2d 600 & 613.....19,23,47,48,49

Quantity of Books v. Kansas, 378 U.S. 205 89 S.Ct. 1733 31,38,41,55

Ranck v. Bonal Enterprises, Inc., 359 A. 2d 748, (Pa. Supreme Court 1976) 23

Richards v. State, 470 S.W. 2d 394, 497 S.W. 2d 770 14,20,34,43,49,58

Seattle v. Bittner, 505 P. 2d 226 (Wash. 1973) 68

Smith v. California, 361 U.S. 147 (1959) 18,26,27

Smith v. United States, U.S. 97 S.Ct. 1756 19,62,63

Southeastern Promotions, Ltd. v. Conrad, 95 S.Ct. 1239, 420 U.S. 546 24,30,33,41,48

Spokane Arcades, Inc., v. Ray, 449 F. Sup. 1145 (E.D. Wash. 1978) 52

State ex rel Andrews v. Chateau X, Inc., 250 S.E. 2d 603, (N.C. 1979) 50,54

State ex rel. Field v. Hess, 540 P. 2d 1165, (Okla. Supreme Court 1975) 23

State ex rel. Ewing v. Without a Stitch, 37 Ohio St. 2d 95, 307 N.E. 2d 911, (Ohio Supreme Court 1974), dismissed 421 U.S. 923 (1975) 23

State v. Stambaugh, No. 216, 943 126th Judicial District Court 14,33,35

Teitel Film Corporation v. Cusack, 390 U.S. 139, 88 S.Ct. 754..... 15,41

Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) 15,20

Universal Amusements Co., Inc., v. Vance, 587 F. 2d 159 67

U.S. v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400 15,33

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 96th S.Ct. 1817 59

V.S.D., Inc., et al v. State of Tennessee ex rel Webster, S.W. 2d (No. 502 Ct. C.A., August 14, 1978) 65

Wade v. Haddad, No. 78-2055-C District Court Dallas County 68th Judicial District (1978) 14,36

Werblud, Ex parte, 536 S.W. 2d 542 (1976) 21,44

Whitney v. California, 274 U.S. at 378 60

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BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

The appellee would submit in lieu of the general question presented by the appellants that the following questions are presented:

1. Is a state statute which authorizes the entry of an injunction restraining the exhibition of unidentified films, on pain of contempt, unconstitutional under the First and Fourteenth

Amendments because it authorizes a prior and permanent restraint against the exhibition of unnamed films prior to an adversary hearing at which a judicial determination of obscenity is made?

2. Is the Texas Nuisance Statute [Article 4667 (a) (3), Vernon's Texas Civil Statutes] which authorizes an injunction against any premises, place or building for the commerical manufacturing, distribution or exhibition of obscene materials unconstitutional as a prior restraint under the First and Fourteenth Amendments because of any or all of the following procedural deficiencies:

A. Neither the Statute nor the Texas Rules of Civil Procedure have any built-in procedural safeguards which are necessary when regulating materials presumed protected by the First Amendment.

B. The State can obtain an ex parte temporary restraining order for a ten day period.

C. A temporary injunction may be granted, not only against material in existence, but future unnamed motion pictures on the basis of "probable right" to the relief sought and that the evidence "tends" to support the cause of action.

D. A temporary injunction does not constitute a ruling on the merits or final adjudication of obscenity *vel non* of films in existence, nor adjudication that all such films with similar conduct are obscene.

E. Any appeal of a temporary injunction does not go to the merits of any past or future obscene material but whether the trial court abused its discretion in granting the temporary injunction.

F. There is no provision for a prompt final hearing on the merits.

G. There is no provision for a prompt judicial determination.

H. Past exhibition or distribution as well as continued exhibition or distribution of any unidentified materials presumed protected by the First Amendment subjects the person to a criminal contempt charge even though the injunction may be erroneous but not void, and the unnamed book, magazine or film has not been determined obscene before issuance of the contempt charge.

3. Is such a State statute unconstitutional under the First and Fourteenth Amendments because it authorizes the entry of an injunction restraining the exhibition of unidentified films under a public nuisance doctrine and therefore authorizes the imposition of absolute liability in the form of criminal contempt for the exhibition of an obscene film?

4. Should the *en banc* decision of the Fifth Circuit be affirmed that any statute which would authorize a one-year closure order against an establishment found to be a nuisance because of commercial obscenity, unless a penal bond of up to $5,000 is posted to insure against future violations of the nuisance laws is unconstitutional under the First and Fourteenth Amendments as applied to film exhibitors because the law authorizes the imposition of a prior restraint against the future exhibition of any film, whether obscene or not, upon a finding that obscene films have been exhibited in the past?

STATUTE INVOLVED

The Texas Nuisance Statute, Article 4667, *Vernon's Texas Civil Statutes,* is as follows:

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute

a public nuisance and shall be enjoined at the suit of either the State of any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commerical exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

STATEMENT OF THE CASE

In October of 1973, the King Arts Theatre, Inc. was operating a motion picture theatre for adults only in an enclosed theatre in San Angelo, Texas, showing sexually explicit films which it believed to be commercially acceptable. A notice was received from the landlord terminating the lease as of November 15, 1973, and conveying information that the County Attorney, George E. McCrea, had contacted the landlord stating he intended to bring an application for injunction as a nuisance (A. 38). On November 12, 1973, suit was filed by the Theatre and thereafter amended because of amendment of the Texas statute requesting declaratory judgment and injunctive relief and challenging the facial constitutionality of Article 4667 of the Texas Code which provided for the abatement of public nuisances (A. 28, 54). By agreement of all parties, the status quo was to be maintained until determination of the issue (A. 128). Chief Judge Brown of the Fifth Circuit Court of Appeals consolidated this case with the approximately twenty other cases before a three judge court in the Southern District of Texas. A pre-trial conference was held on August 12, 1974. In an effort to simplify the process of deciding all of various cases, three cases, which presented straight-forwardly the issues in the remaining cases were accepted. A pre-trial order was agreed upon between the parties in this cause and entered setting forth the contentions of the parties and the contested issues (A. 65). The three judge district court determined that Article 4667 (a) (3) was unconstitutional, (A. 74) and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. A panel of the Court divided on the ruling and upon rehearing en banc the court in its majority opinion determined Article 4667 (a) (3) of *Vernon's Texas Civil Statutes* was unconstitutional.

The Court of Appeals in its opinion determined that Article 4666 of *Vernon's Texas Civil Statutes* which provided for a one-year closing remedy and bond provisions was inapplicable to

obscenity and that the injuncive relief provided in Article 4667 was the exclusive procedure for abating obscene exhibitions as nuisances. It further stated that if Article 4666 could be applied to nuisances as defined in Article 4667 that the statutes would be patently unconstitutional insofar as they pertain to obscenity and would constitute an impermissible prior restraint since the State would be enjoining the future operation of a business which disseminates presumptably First Amendment protected material solely on the basis on the nature of the materials which were sold in the past.

The majority of the Court of Appeals for the Fifth Circuit further held that a nuisance statute as applicable to obscenity under Article 4667 (a) (3) lacks the procedural safeguards required in dealing with the publications presumed protected by the First Amendment.

The Court of Appeals also decided that an injunction against future exhibition of *unnamed future films* could not stand for it amounts to an impermissible prior restraint on materials not yet declared obscene.

The State of Texas appealed but did not question the ruling of the Court below that the closing provisions of Article 4666 are unconstitutional if applied to motion picture houses or book stores. The questions presented by the State of Texas is whether the Texas Nuisance Statute, Article 4667 (a) (3) is an impermissible prior restraint upon the exercise of First Amendment rights or lacks procedural safeguards so as to be an impermissible prior restraint upon the exercise of rights guaranteed by the First Amendment.

SUMMARY OF THE ARGUMENT

1. A statute which authorizes an injunction against the exhibition and distribution of unidentified and unnamed films, magazines and books prior to a judicial determination of obscenity violates the First and Fourteenth Amendments and is unconstitutional. Such a statute authorizes the issuance of broad injunctions against materials not identified or named or even necessarily in existence but which may, at some future date, be found obscene under the definition of obscenity. The statute authorizes the State Judiciary literally to remove entirely from the public domain in advance of any judicial determination of obscenity publications and films which the distributor restrained must remove because such materials could be found obscene by a single judge sitting without a jury. This is impermissible and unlawful prior restraint and the decision of the Fifth Circuit Court of Appeals should be affirmed.

The Court must measure the impact of the state statute upon the distribution of nonobscene materials. A civil adjudication of obscenity where procedural requirements are satisfied would give the best possible notice that the material is unlawful and further distribution would expose the distributor to the risk of criminal penalties. An injunctive procedure against particular items has the saving grace of a degree of certainty in an area of law which the court concedes retains a degree of uncertainty. The original civil injunction, under the Texas statute enables the state to relieve itself of the burden of proving the obscenity of the material beyond a reasonable doubt. The drastic remedy of injunction is imposed by a single judge on a preponderance of the evidence increases the margin of error inherent in erroneous suppression of constitutionally protested material. The lesser burden of proof increases the hazard of self-censorship and also exposes the distributor to contempt citations for future unnamed material when the injunction was issued on this lesser burden of proof.

Another danger is it allows the state to bypass a jury determination. Although the use of civil injunctions imposes dangers the use of the Texas procedure drastically transgresses the limitations imposed by Court since the order enjoins the defendant from distributing the work adjudicated obscene and from distributing any and all other books, magazines and films which are obscene under the law of Texas as specified by that judge. The distributor in self-censorship has the burden to remove all books or films which could ultimately be found obscene or else be guilty of contempt. This Court has never sanctioned the kind of injunctive relief so authorized by the Texas statute and this Court has taken great care to point out that restraint should not be granted against materials which are not before the Court and not yet adjudicated obscene.

Texas would authorize the state courts to paint with a broad brush the injunction which is an impermissible prior restraint. An injunction against the distribution of unnamed obscene films in the future fails to take into account the fundamental distinction in our constitutional jurisprudence between prior restraint and subsequent punishment. The chief purpose of the First Amendment is to prevent previous or prior restraints and to provide a broader degree of protection against prior restraint than it affords against subsequent punishment. The First Amendment abhors prior restraint and prefers subsequent punishment. The coercive nature of such an injunction against future distribution will lead a distributor to steer wide of the danger zone by removing all borderline material which will inevitably result in denying public access to constitutionally protected material Strict liability would be imposed.

The Fifth Circuit Court of Appeals should be affirmed that such an injunction against future materials prior to a judicial determination of obscenity is an impermissible prior restraint under the First and Fourteenth Amendments.

2. The Texas nuisance statute lacks procedural safeguards and because of these procedural deficiencies is an unconstitutional prior restraint under the First and Fourteenth Amendments. A limited injunction procedure with built-in safeguards was approved by this Court in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 437. The teaching of that case and all cases thereafter by this Court is that adequate procedures are required to ascertain whether certain materials are obscene to insure the necessary sensitivity to freedom of expression. It is for that reason that before there can be a prior restraint in one of the narrowly defined exceptions to the prohibition against prior restraints, there must be built-in procedural safeguards that reduce the danger of suppressing constitutionally protected speech.

Any restraint should be postponed until a judicial determination of obscenity is made following notice at an adversary hearing. The Court should provide for a prompt hearing on the merits and the Court should hand down a decision promptly after termination of the hearing.

The Texas statute has no built-in procedural safeguards nor do the Texas Rules of Civil Procedure provide such safeguards as are required by the First Amendment. The Texas decisions do not provide any authoritative judicial construction of procedures. The State of Texas can obtain an ex parte temporary restraining order for up to a ten day period and can thereafter obtain a temporary injunction upon notice which does not constitute a ruling on the merits or a final adjudication of obscenity but the injunction is granted on the basis of probable right or probable injury. The temporary injunction is subject to appeal only on whether or not the trial court abused its discretion in granting the temporary injunction. There is no provision either in the statute or in the Texas Rules of Civil Procedure nor by judicial construction that there must be a prompt, final hearing on the merits or a prompt judicial determination, which are

both necessary. Finally, after an injunction is issued an exhibitor or theatre operator for some exhibition in the past could be charged with criminal contempt as well as civil contempt subjecting him to a fine of $500.00 and imprisonment for six months without a jury trial plus possible civil contempt of jailing for failing to surrender the motion picture film or book or magazine or promising to stop continued exhibition.

The Fifth Circuit Court of Appeals decision is correct that the Texas statute, Article 4667(a)(3) is unconstitutional as lacking procedural safeguards.

3. A state statute authorizing an injunction under a public nuisance doctrine restraining the exhibition of unidentified films in the future and authorizing the imposition of absolute liability in the form of criminal contempt is unconstitutional.

Any system of prior restraint comes to the Court with the heavy presumption against its invalidity and such a use of the public nuisance doctrine would be a prior restraint. This Court has always determined that only a judicial determination in an adversary proceeding insures the necessary sensitivity to protect freedom of expression. The injunction would not be limited to the materials in existence and presented to the Court but would premit a court to draft an injunction setting forth sexual conduct which, if portrayed, the Court would find obviously obscene. Public nuisance, which usually relates to odors or such conduct as intoxicating liquors or prostitution is neither designed nor suitable for future injunctions against unnamed publications in which the person may be both guilty of both criminal contempt and civil contempt with subsequent punishment without a jury.

The court or judge would become a censor and the operation and effect of such an injunction would be the essence of censorship.

The majority opinion of the Fifth Circuit that a blanket ban on the showing of the films not judicially declared to be obscene should not be sustained on the basis of attempting to interweave threads of language from obscenity statutes is correct. A listing of forbidden acts begs the question since no one can know in advance whether a film is legally obscene. Each motion picture film must be judged on its own merits and taken as a whole. Likewise, contemporary community standards must be applied by the fact finder. A limited civil injunction proceeding should not be extended.

This Court has suggested a finding of obscenity in a civil action might be in the best interests of all and that no criminal action can be brought until after the civil action determination and a further exhibition and distribution. The nuisance statute does not give this protection but tries both obscenity and the punishment at the same time without the usual protections of criminal proceedings. It is similar to the seizure without a hearing.

The Texas statute permits private individuals, as well as government officials, to bring suit so that a private individual could bring a nuisance action against a book publisher, a newspaper, a book store, a motion picture theatre, or any other exhibitor, distributor or manufacturer of material presumed protected by the First Amendment and hopefully find a judge to grant such an injunction. The practical effect of this prior restraint is obvious. This Court, on occasions, has reversed, as well as other appellate courts reversed, findings of obscenity where communities have overstepped the bounds such as enforcement.

A motion picture, just as a book or magazine, may be commercial speech, but it also is protected by the First Amendment. The fact that material is sold does not deprive it of protection by the First Amendment.

A nuisance statute could also apply to newspapers. A statute applied to motion picture theatres showing films containing sex or book stores which sell magazines and books containing sexual pictures or descriptions can also be applied to newspapers since there is no limitation in the statute. The nuisance statute could likewise be applied to commercial manufacturers, such as book publishers or printing houses, or even publishers of newspapers.

The practical effect of the statute is the prior restraint since obscenity is a question of fact to be measured by contemporary community standards of the community. It would be impossible for the judge in an injunction order to freeze the definition of contemporary community standards. The injunction is not to exhibit certain sexual conduct which the court in the future might find obscene if presented to him. The material would be prior restrained and never have the opportunity of facing the acid test of acceptance under prevailing of community standards.

The application of an injunction against future publications promotes uneven and improper applications. The difference in the injunctions issued in Austin, Texas, as cited by the State of Texas, in comparison with the injunction in the appendix applied by the court several years later to Dallas, Texas, shows the uneven application. The judge *has unlimited discretion in framing the injunction.* The trial judge, in issuing a temporary or permanent injunction, would be permitted to pick and choose what ultimate sexual acts, actual or simulated, or other sexual conduct would be in the injunction.

Any injunction should only be the limited exception permitted by this Court against material which has been presented to the Court in a judicial determination and found obscene and which thereafter is exhibited or distributed so that the distributor would know that he had violated the injunction.

Otherwise, public nuisance against future publications is prior restraint and coming in the back door against obscenity by punishing under the guise of contempt the exhibitor.

There is so much uncertainty and so much chance exists for mischief that the use of public nuisance statutes as a tool for controlling obscenity is not sensitive enough to withstand the requirements by this Court for dealing with obscenity and is an impermissible prior restraint.

4. The Fifth Circuit Court of Appeals found that the Texas nuisance statute could not be construed so as to permit the closure of a theatre for one year as a nuisance unless a penal bond was posted. The State of Texas conceded in its Brief and Jurisdictional Statement that the mandatory closing under a nuisance statute would be unconstitutional as applied to motion picture houses or book stores. The Court should affirm, as a precautionary measure, because of abuses in lower courts as shown by the cases cited by the Fifth Circuit. The closing of the theatre creates an *in terroram* effect, a draconian effect and a sledge hammering of the printing press, camera and all the tools of expression by closing a theatre because of past actions and thereby prohibiting the showing of any motion picture in the future which would be presumed protected by the First Amendment and likewise prohibiting future sales of presumed protected books.

5. King Arts Theatre, as the prevailing party, is entitled to an award of attorney's fees as authorized by the Attorney's Fees Award Act of 1976. In accordance with this Court's holding in *Hutto* v. *Finney,* U.S. , 98 S.Ct. 2565, the cause should be remanded to the managing judge for an award to the appellee of reasonable attorney's fees and costs.

ARGUMENT

1. Article 4667(a)(3), Texas Revised Statutes, Which Authorizes An Injunction Against The Exhibition And Distribution Of Unidentified And Unnamed Films, Magazines And Books Prior To A Judicial Determination Of Obscenity Is Unconstitutional Under The First And Fourteenth Amendments.

Texas Revised Statutes, Article 4667(a)(3), authorizes the courts of the state of Texas to enjoin, as a public nuisance, the manufacture, distribution and exhibition of obscene publications and films. The Texas courts which have interpreted this provision have concluded that its authority to enjoin is not limited merely to restraint against particular films and publications which have been judicially declared obscene after an adversary hearing; rather, the statute authorizes the issuance of broad injunctions against the circulation of materials not identified or named or even necessarily in existence, but which may, at some future date, be found obscene under the definition of obscenity in force in Texas and spelled out in the injunction. *Richards* v. *State,* 497 S.W. 2d 770 (Tex. Civ. App. - Beaumont, 1973); *Locke* v. *State,* 516 S.W. 2d 949 (Tex. Civ. App. - Texarkana, 1974); *Wade* v. *Haddad,* No. 78-2055-C, District Court, Dallas County, 68th Judicial District 1978);[1] *State* v. *Stambaugh,* No. 216943, District Court, Travis County, 126th Judicial District (1974).[2] Thus, the statute authorizes the state judiciary literally to remove entirely from the public domain, in advance of any judicial determination of obscenity, publications and films which the distributor restrained must, under the terms of the injunction, remove from his bookshelves and film library because such materials *could* be found obscene by a single judge, sitting without a jury. The Fifth Circuit Court of Appeals determined that the kind of injunctive relief sanctioned by Article 4667(a)(3) constitutes a blatant and unlawful prior restraint, in violation of the First and Fourteenth Amendments and, consequently, declared the statute unconstitutional. That decision should be affirmed.

[1]The injunction entered in the *Wade* case is set forth at pp. A-10 - A-13 of the appellee's Motion to Affirm or Dismiss, filed with this Court.

[2]The injunction entered in the *Stambaugh* case is set forth at Appendix III of the appellants' Jurisdictional Statement filed with this Court.

This Court has recognized that the states are not limited exclusively to the remedies of the criminal law in combatting the dissemination of publications and films which are not entitled to the protection of the First Amendment because of their obscene content. *Kingsley Books* v. *Brown,* 354 U.S. 436 (1957). Rather, the Court has held that, if certain constitutionally mandated procedureal safeguards are scrupulously followed, a civil action brought by the state to enjoin the distribution of particular named films or publications is constitutionally permissible. *Kingsley Books, supra; Freedman* v. *Maryland,*380 U.S. 51 (1965); *see also, Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961).

In assessing the constitutional validity of state attempts to prevent by injunction the circulation of particular materials thought to be obscene, the Court has consistently measured state procedures by their impact upon the distribution of non-obscene materials. The Court has been vigilant to insure that whatever procedures are adopted by the state and federal governments are impotent to suppress constitutionally protected literature. *Freedman, supra; Tietel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968); *Blount* v. *Rizzi,* 400 U.S. 410 (1971); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971).

Thus, the Court has concluded that in order to assure non-obscene material the constitutional protection to which it is entitled, a governmental procedure designed to restrain the circulation of allegedly obscene material must include the following safeguards: (1) the government must bear the burden of proving that the film or publication in question is obscene; (2) no final restraint may be imposed except upon a judicial determination of obscenity following an adversary proceeding initiated by the government; (3) any restraint imposed pending final judicial resolution of the question of obscenity must be limited in duration to the shortest fixed time consistent with sound judicial resolution; and (4) prompt final judicial resolution must be assured. *Freedman, supra; Blount* v. *Rizzi, supra.* Only when these procedural safeguards have been strictly observed and only when the restraint has been directed against specifically identified items adjudged obscene after an adversary hearing and not against materials which were not before the court, has this Court approved the issuance of an injunction against the distribution of obscene materials. *Kingsley Books, supra; see Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973).[3]

At the same time, the Court has noted that, when such procedural requirements *are* satisfied, a civil injunctive proceeding directed against particular films or publications, even though its purpose is to impose a prior restraint, possesses certain attributes to commend itself, in terms of First Amendment values, over the use of a criminal statute which does not previously restrain but rather subsequently punishes. A civil adjudication

[3]As is demonstrated *infra,* in Argument II, Article 4667 (a) (3) of the Texas Revised Civil Statutes is unconstitutional because it fails to include the safeguards which this Court, in *Freedman,* held are constitutionally required. In the instant argument, the Appellees contend that, apart from the procedural deficiencies of Article 4667(a)(3), the statute is unconstitutional because it authorizes substantive relief which is in direct conflict with the First and Fourteenth Amendment.

of obscenity, the Court has observed, gives a distributor of literature or films the best possible notice that his merchandise is unlawful *before* he is exposed to the risk of criminal penalties for its distribution. *Paris Adult Theatre I* v. *Slaton, supra,* at 413 U.S. 55; *Kingsley Books* v. *Brown, supra,* at 354 U.S. 442; *see also, McKinney* v. *Alabama,* 424 U.S. 669, 679 (1976) (Brennan, J., concurring). Thus, an injunctive procedure directed at particular items has, at least, the saving grace of importing a degree of certainty into an area of the law which even the members of this Court comprising the majority in *Miller* v. *California,* 413 U.S. 15 (1973) concede retains a degree of uncertainty. *See* Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment,* 9 Ga. L. Rev. 533, 558-561 (1975).[4]

Still, various members of this Court and of other courts have convincingly demonstrated that even civil injunctive procedures complying fully with the requirements of *Freedman* and directed solely against particular named items alleged to be obscene pose grave dangers to First Amendment values. In the first place, the employment of a civil injunctive proceeding by a state as a means of controlling obscenity, rather than a criminal prosecution, enables the state to relieve itself of the burden of proving to a jury, representing a cross-section of the community, the obscenity of the material in question beyond a reasonable doubt. Instead, the state may obtain the drastic remedy of injunction against the distribution of publications or films by merely proving to a single judge by a preponderance of the evidence that the items in question are obscene. Thus, a

[4]Article 4667(a)(3) of the Texas Revised Civil Statutes does not even have the saving grace of certainty, for an injunction entered pursuant to that statute is directed not just against named items found to be obscene but is directed against all unnamed and unidentified materials, not before the court, which could be found obscene in the future.

judge who finds that the state has met this lesser burden of proof has the power to deprive the members of his community of the right to read or view publications or films by enjoining their distribution. Given the fact that constitutionally protected literature is ". . .often separated from obscenity by a dim and uncertain line,"[3] lessening the state's burden of proof on the issue of obscenity increases the margin of error inherent in all factfinding procedures to such a degree that erroneous suppression of constitutionally protected materials is inevitable. *See* the concurring opinion of Justice Brennan, in which Justices Stewart and Marshall joined, in *McKinney* v. *Alabama, supra,* at 424 U.S. 683-685.

Moreover, the use of a lesser burden of proof increases the hazards of self-censorship by those who distribute literature or films dealing with the subject of sex.

> "The inevitable tendency of the preponderance-of-the-evidence standard—by forcing persons dealing in marginal material to make hard judgments as to whether such material is obscene in order to avoid civil sanctions—would be to limit the volume of at least the marginal material a bookkseller could permissibly handle, and thus 'restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' *Smith* v. *California,* 361 U.S. 147, 154 (1959)." *McKinney* v. *Alabama, supra,* at 424 U.S. 684 (Brennan, J., concurring).

A second danger posed to First Amendment rights by the state's use of a civil injunctive procedure as opposed to a criminal prosecution in the obscenity area is that the civil in-

[3] *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

junctive procedure allows the state to bypass a jury determination on the issue of obscenity. Central to the test of obscenity promulgated by this Court in *Miller* v. *California,* 413 U.S. 15 (1973) is whether the average person, *applying contemporary community standards,* would find that the expression in question appeals to the prurient interest and depicts or describes sexual conduct in a manner which is patently offensive. *See also Smith* v. *United States,* 431 U.S. 291, 301 (1977). If this test is to be properly applied, ". . .it seems clear that a jury, as a microcosm of the community, is the only 'trier of fact' fit to conduct the inquiry. . . ." *People ex rel. Busch* v. *Projection Room Theater,* 550 P. 2d 600, 619 (Cal. Supreme Court 1976) (Tobriner, J., dissenting).

In a civil injunctive proceeding, however, ordinarily no jury is impanelled to determine whether a work is obscene under contemporary community standards. Rather, ". . .that crucial determination—upon which the censorship of a book, a magazine, a play or a motion picture turns—is left instead to a single judicial officer." Id., at 550 P. 2d 619. Thus, the effect of the use by a state of a civil injunctive procedure in an effort to rid the community of obscene works is to ". . .reduce the adult population. . .to reading only those books that do not offend the sensibilities of the most 'sensitive' trial judge in their community."[4] *Id.,* at 550 P. 2d 620. *Cf. Butler* v. *Michigan,* 352 U.S. 380 (1957). *See also McKinney* v. *Alabama, supra,* at 424 U.S. 687-689 (Brennan, J., concurring); *Kingsley Books, Inc.* v. *Brown, supra,* at 354 U.S. 448 (Brennan, J., dissenting).

[4] An additional problem with civil injunctive proceedings in the area of obscenity arises out of the nature of the remedy itself. An injunction by definition *permanently* removes the particular items found to be offensive from public circulation. Community standards do not remain constant, however, but by their very nature continue to evolve. If, at some point, community standards would no longer be offended

Although the use of civil injunctions to suppress obscene materials poses dangers to the unobstructed circulation of constitutionally protected works—even when the requirements of *Freedman* are met—this Court, as already noted, has not deemed it constitutionally necessary to withhold completely from the states the power *ever* to employ such means in their efforts to control the distribution of obscenity. *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961). A careful balancing of the competing interests involved has led the Court to conclude that First Amendment values can be preserved adequately by placing substantial limitations upon the use of the civil injunctive remedy in obscenity cases and by insisting upon faithful adherence to the procedural safeguards outlined in *Freedman* v. *Maryland, supra.*

The Texas procedure at issue in the present case drastically transgresses the limitations placed upon the power of the states by this Court's prior decisions. As interpreted by the state courts, Article 4667(a)(3) of the Texas Revised Civil Statutes authorizes the court, upon a finding that the defendant has circulated an obscene item, to enter an order permanently enjoining the defendant from distributing the work adjudicated obscene *and from distributing any and all other books, magazines and films which are obscene under Texas law.* The only condition attached to the exercise of this authority by the Texas trial courts is that the statutory definition of obscenity in force in Texas must be set forth as part of the restraining order. *Richards* v. *State,* 497 S.W. 2d 770 (Tex. Civ. App. - Beaumont, 1973); *Locke* v. *State,* 516 S.W. 2d 949 (Tex. Civ. App. - Texarkana, 1974).

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by the enjoined publications, then the continuing effect of the injunction would be to deny the public access to constitutionally protected materials. Moreover, an injunction prevents the materials in question from ever exerting an influence on community standards. *See McKinney* v. *Alabama, supra,* at 424 U.S. 685, n. 4 (Brennan, J., concurring).

Thus, Article 4667(a)(3) authorizes as injunction against the exhibition and sale of unnamed films and publications which have never been adjudicated obscene. It authorizes the imposition of an injunction against the circulation of films and publications not yet created or published. And it imposes upon the distributor of materials presumptively protected by the First Amendment the duty to inspect all books, magazines and films he intends to distribute, and the burden to remove from his bookshelves and theater screens, in advance of any judicial determination of obscenity, all works which *could* ultimately be found obscene. If he does not, and he circulates an item which the court sitting without a jury, finds to be obscene, he is guilty of criminal contempt and may be fined $500.00 and sentenced to jail for six months without the benefit of the jury trial to which he would be entitled were he charged with violation of the Texas criminal law which makes it a misdemeanor to distribute obscene material.[7] As the court below correctly observed, quoting Chief Justice Hughes' opinion in *Near* v. *Minnesota,* 283 U.S. 697, 713 (1931), "[t]his is of the essence of censorship."

This Court has never sanctioned the kind of injunctive relief authorized by Article 4667(a)(3). Indeed, on the two occasions upon which the Court has approved of a state's use of a civil injunction in the area of obscenity, the Court took great care to

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[7] Article 1911(a), §2 of the Texas Revised Statutes authorizes the courts of the state of Texas to punish by a fine of $500.00 and a jail term of six months any person found to be in contempt of court. The Texas Supreme Court has held that the contemnor has no right to a jury trial. *Ex Parte Werblud,* 536 S.W. 2d 542 (Tex. Supreme Court 1976). On the other hand, a person charged under the Texas criminal statute making it a misdemeanor to distribute obscene matter (Tex. Penal Code §43.23) does have a right to a jury trial. *See* Article I, Sec. 10, Texas Constitution. *Franklin* v. *State, 576 S.W. 2d 621 (Tex. Court of Criminal App. En Banc 1978); Evert* v. *State,* 561 S.W. 2d 489 (Tex. Court of Crim. App. 1978); *Dexter* v. *State,* 544 S.W.2d 426 (Tex. Court of Crim. App. 1976).

point out that in each case the state withheld any restraint against materials which were not before the court and which, therefore, had not yet been adjudicated obscene. Thus, in *Kingsley Books* v. *Brown, supra,* at 354 U.S. 445, the Court, in noting the difference between the New York civil injunctive procedure at issue there and the Minnesota nuisance procedure condemned in *Near* v. *Minnesota, supra,* stated:

> ". . .Unlike *Near* §22-a is concerned solely with obscenity and, as authoritatively construed, *it studiously withholds restraint upon matters not already published and not yet found to be offensive."* (Emphasis added).

Similarly, in *Paris Adult Theatre I* v. *Slaton, supra,* at 413 U.S. 55, the Court, in commenting favorably upon the Georgia injunctive procedure at issue there, stated:

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected."

By way of contrast, Article 4667(a)(3) of the Texas Revised Civil Statutes authorizes the state courts to paint with a broad brush by enjoining the distribution of publications and films not before the court. Upon a finding that the defendant has distributed an obscene item in the past, his future right to circulate publications and films presumptively protected by the First Amendment and not yet adjudicated obscene is severely curtailed. Article 4667(a)(3) authorizes precisely the kind of injunctive relief condemned by this Court as an impermissible prior restraint nearly forty years ago in *Near* v. *Minnesota,* 283 U.S. 697 (1931). Clearly, an injunction against the distribution of books, magazines and films prior to their creation and publication and prior to a judicial determination that they are not entitled to constitutional protection is in direct conflict with

the First Amendment. A multitude of courts have so held. *See, e.g., Ladoza Canning Corp.* v. *McKenzie,* 370 So. 2d 1137 (Fla. Supreme Court 1979); *People ex rel. Busch* v. *Projection Room Theater,* 550 P. 2d 600 (Cal. Supreme Court, 1976); *Ranck* v. *Bonal Enterprises, Inc.,* 359 A. 2d 748 (Pa. Supreme Court 1976); *State ex rel. Ewing* v. *Without a Stitch,* 37 Ohio St. 2d 95, 307 N.E. 2d 911 (Ohio Supreme Court 1974), *app. dismissed,* 421 U.S. 923 (1975); *State ex rel. Field* v. *Hess,* 540 P. 2d 1165 (Okla. Supreme Court 1975); *Parish of Jefferson* v. *Bayou Landing, Ltd.,* 350 S. 2d 158 (La. 1977); *News Mart, Inc.* v. *State ex rel. Webster,* 561 S.W. 2d 752 (Tenn. 1978); *Fehlhaber* v. *North Carolina,* 445 F. Supp. 130 (E.D.No. Carolina 1978); *New Riviera Arts Theatre* v. *State,* 412 S.W. 2d 890 (Tenn. Supreme Court 1967). Accordingly, Article 4667(a)(3) was properly declared unconstitutional by both courts below.

The dissenters in the court below argued, however, that an injunction against the distribution of unnamed obscene materials in the future is not significantly different from a criminal statute which proscribes the circulation of obscene items. In their view, if the states have the power to enact criminal laws providing for the punishment of those who circulate obscene films and publications, as this Court has held, then it necessarily follows that the states have the power to enact laws authorizing the issuance of injunctions to prevent the circulation of these same unidentified and unnamed obscene films and publications. The reasoning advanced in the dissenting opinion is fatally flawed, however, because it altogether fails to take into account the distinction, fundamental in our constitutional jurisprudence, between prior restraint and subsequent punishment. As the court noted in *Fehlhaber* v. *North Carolina,* 445 F. Supp. at 139 (E.D. No. Carolina 1978), the view advanced by the dissenters ". . .ignores basic principles rooted in our jurisprudence since Blackstone."

It is beyond dispute that ". . .it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near* v. *Minnesota,* 283 U.S. 697, 713 (1930); *Patterson* v. *Colorado ex rel. Attorney General,* 205 U.S. 454, 462 (1907); *see Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 556-557 (1976). Thus, ". . .while the government may be able subsequently to punish those who engage in unprotected speech, only in exceptional circumstances may the same speech. . .be enjoined before it occurs." *Fehlhaber* v. *North Carolina, supra,* at 445 F. Supp. 139. For this reason, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

Moreover, in giving effect to the First Amendment's primary aim, this Court has held that the constitution guarantees a broader degree of protection against prior restraint of speech than it affords against subsequent punishment for the same speech. As this Court stated in *Southeastern Promotions Ltd.* v. *Conrad, supra,* at 420 U.S. 558-559:

> "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958)."

A prior restraint on expression poses the greatest danger to First Amendment rights and is far more serious than subsequent punishment under the criminal laws.

> ". . .prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n* v. *Stuart, supra,* at 427 U.S. 559 (footnote omitted).

The argument made by the dissenters below, that because distribution of obscene materials may constitutionally be punished as a crime it can also be validly enjoined, fails to take into account the First Amendment's abhorrence of prior restraint and preference for subsequent punishment as the means by which to check abuses of the liberties guaranteed by that Amendment. Their argument in support of the constitutionality of Article 4667(a)(3) also fails adequately to assess the "operation and effect of the statute in substance." *Near* v. *Minnesota, supra,* at 283 U.S. 713; *Kingsley Books* v. *Brown, supra,* at 354 U.S. 441.

The avowed purpose and unmistakeable effect of Article 4667(a)(3) is the imposition of a prior restraint on the distribution of books, magazines and films which have never been adjudicated obscene. A distributor of literature and films who is under a court order entered pursuant to Article 4667 (a) (3) is judicially restrained, under pain of contempt, from circulating *any* obscene publication or film as defined under Texas law. In order to comply with such a court order, he must carefully inspect all merchandise he intends to sell or exhibit, *prior to*

distribution and exhibition, and remove from the marketplace any material which could be found obscene under the definition set forth in the court's order. Thus, where *Freedman* v. *Maryland, supra,* expressly imposes upon the government the burden of proving that a publication or film ought to be censored as obscene, an Article 4667 (a) (3) injunction imposes the burden of censorship upon the distributor. A failure on the defendant's part to take affirmative steps to remove potentially offending materials from his bookshelves and theater screens can trigger a contempt of court citation which will be heard by the very judge whose order was flouted, sitting without a jury, and which can result in a $500.00 fine and imprisonment for six months.

The operation and effect of an Article 4667 (a) (3) injunction is, therefore, to cause the defendant to remove from the public domain films and publications in advance of any judicial determination of obscenity. And the coercive nature of the injunction will lead the defendant to steer far wide of the danger zone by removing from his inventory all borderline material. This will inevitably result in denying the public access to constitutionally protected materials.

Moreover, an Article 4667 (a) (3) injunction operates to impose absolute liability for the sale or exhibition of an obscene item. The defendant is guilty of criminal contempt if his inventory includes a single obscene item, irrespective of whether he had the slightest idea of the nature of that item.

In *Smith* v. *California,* 367 U.S. 147 (1959), this Court held unconstitutional under the First Amendment a criminal ordinance which dispensed with any element of *scienter* and imposed strict criminal liability on a bookseller who carried an obscene item. At 361 U.S. 151, the Court stated its reasoning as follows:

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

An Article 4667(a)(3) injunction operates in precisely the same manner. By restraining the defendant from exhibiting any obscene item, irrespective of whether he knows the nature of the material, an Article 4667(a)(3) injunction requires the defendant to limit his stock to those items which he has inspected. Since he will be unable to familiarize himself with all books, magazines and films available for distribution by him, the injunction operates to restrict "the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith* v. *California, supra,* at 361 U.S. 154. The defendant's self-censorship, compelled by the injunction, is "a censorship affecting the whole public. . .Through it, the distribution of all books, both obscene and not obscene, [is] impeded." *Id.*, at 361 U.S. 154. The kind of injunction authorized by Article 4667(a)(3) is, accordingly, clearly unconstitutional under *Smith* v. *California, supra.*

Both the district court and the court below correctly determined that Article 4667(a)(3) is unconstitutional under the First and Fourteenth Amendments. Their decisions should, accordingly, be affirmed by this Court.

2. The Texas Nuisance Statute [Article 4667(a)(3) Vernon's Texas Civil Statutes] Which Authorizes An Injunction Against Any Premises, Place Or Building For The Commercial Manufacturing, Distribution Or Exhibition Of Obscene Materials is Unconstitutional As A Prior Restraint Under The First And Fourteenth Amendments Because Of Procedural Deficiencies.

This Court has approved a limited injunction procedure against the publication of a particular book judged to be obscene. *Kingsley Books Inc.* v. *Brown,* 354 U.S. 437, 77 S.Ct. 1325. This has been called a model of an injunctive procedure designed to prevent the sale of obscene books. *Freedman* v. *Maryland,* 380 U.S. 51 at 60, 85 S.Ct. 734 at 740. *Blount* v. *Rizzi,* 400 U.S. 410, 91 S.Ct. 423 at 430. See also, *Paris Adult Theatre* v. *Slaton,* 413 U.S. 48, 93 S.Ct. 2628 at 2634.

The New York procedure approved in *Kingsley Books* v. *Brown, supra,* was a very limited exception, and the Court said the limitation of *Kingsley Books* is the exception and is to be closely confined so as to preclude what may fairly be deemed licensing or censorship. 354 U.S. at 442, 77 S.Ct. at 1328.

Justice Rehnquest speaking for the Court in *McKinney* v. *Alabama,* 424 U.S. 669, 96 S.Ct. 1189 says adequate procedures are required even when dealing with "obscene" material not protected by the First Amendment as follows:

> "While there can be no doubt under our cases that obscene materials are beyond the protection of the First Amendment, . . .those decisions have also consistently recognized that the procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression.' "
>
> 96 S.Ct. at 1193

Justice Brennan in his concurring opinion in *Nebraska Press Association et al* v. *Stuart et al,* 427 U.S. 539, also says the Court has determined that even in those exceptions to the First Amendment "adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment." *Nebraska Press Association, et al.* v. *Stuart, et al.,* 427 U.S. 539, 96 S.Ct. 2791 at 2817. He summarized a number of the cases on free speech in discussing the issue in *Nebraska Press Association.* He said it has been

generally, if not universally considered that it is the chief purpose of the First Amendment's guarantee to prevent previous restraints upon publications. Prior restraints are the essence of censorship and our distaste for censorship is deeply written in our law. The First Amendment thus affords greater protection against prior restraints than it does against subsequent punishment for a particular speech because a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risk of free-wheeling censorship is formidable.

This Court has determined, as shown by the injunctive procedures approved by it, that the First Amendment protection, even as to prior restraint, is not absolutely unlimited and among the exceptions is obscene publications. The exceptions have been interpreted as situations in which the speech involved is not encompassed within the meaning of the First Amendment but as previously stated adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. Justice Brennan said the Nebraska Supreme Court could not use a balancing approach, in holding the presumption must be overcome in light of some perceived justification. The Nebraska Supreme Court misinterpreted this Court's language that a heavy burden is required before there should be the imposition of such a restraint since that means, in the words of this Court:

> "[T]hat, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed 'must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.' "
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> 427 U.S. at 594, 96 S.Ct. at 2819.

The Court, speaking through Justice Burger in *Nebraska Press Association, supra,* said:

> "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."
>
> 427 U.S. at 560, 96 S.Ct. at 2803.

Labeling the statute as a prior restraint does not end the inquiry. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 547, 95 S.Ct. 1239. The Court has held that prior restraints are not unconstitutional per se but has stated there must be a pragmatic assessment of the operation in the particular circumstances. *Kingsley Books* v. *Brown,* 354 U.S. at 442, 77 S.Ct. at 1328. The Court has said that First Amendment protection does not include complete and absolute freedom to exhibit at least once in every kind of motion picture since prior submissions under a proper censorship law may be required. In fact in *Kingsley Books, supra,* the Court points out that while the law moves after publication the book need not, in either case, have yet passed into the hands of the public and in the *Alberts* record, referred to in *Kingsley*, it did not show that the matter found to be obscene had reached the public at the time that the criminal charge of keeping such matter for sale had been lodged. See *Kingsley Books* v. *Brown,* 354 U.S. at 442, 77 S.Ct. at 1328.

In *Southeastern Promotions, Ltd., supra,* the Court pointed out the presumption against prior restraints is heavier and the degree of protection broader than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. This Court states in *Southeastern Promotions, Ltd.,* as follows:

> "In order to be held lawful, respondents action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduced the danger of suppressing constitutionally protected speech.
>
> . . .
>
> "The settle rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' "
>
> 420 U.S. at 561, 95 S.Ct. at 1247.

In *Kingsley Books* v. *Brown, supra,* the New York statute authorized the chief executive or legal officer of a municipality to invoke a "limited injunctive remedy under closely defined procedural safeguards against the sale and distribution of written or printed matter found after due trial to be obscene." 354 U.S. at 437, 77 S.Ct. at 1326. The New York judge, the Court states, refused to enjoin the sale and distribution of *later issues* on the ground that to rule *against a volume not offered in evidence* would impose an unreasonable prior restraint upon freedom of the press. See, 354 U.S. at 439, 77 S.Ct. at 1327. "The New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard'. *Quantity of Books* v. *Kansas,* 378 U.S. 205 at 210, 84 S.Ct. 1723 at 1725."

In *Freeman* v. *Maryland, supra.* the Court summarized the New York injunctive procedure which was approved as follows:

> "That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down

his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected."

380 U.S. at 60, 85 S.Ct. at 740.

In making the pragmatic assessment and in reviewing the procedural safeguards, the statutes and civil procedure of the State of Texas must be reviewed. The conclusion after that review is that there are *no procedural safeguards* as required when dealing with material which may be presumed to be protected by the First Amendment Because of the deficiencies in, or lack of such procedural safeguards, the Texas Nuisance Statute [Art. 4667(a)(3)] is unconstitutional as a prior restraint under the First and Fourteenth Amendments.

A. Neither The Statute Nor The Texas Rules Of Civil Procedure Have Any Built-In Procedural Safeguards Which Are Necessary When Regulating Materials Presumed Protected By The First Amendment.

In reviewing the federal statute on postal regulations the Court held such regulations unconstitutional because they:

"[A]re procedures designed to deny use of the mails to commercial distribution of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression. For government is not free to adopt whatever procedures it pleases for dealing with obscenity. .without regard to the possible consequences for constitutionally protective speech."

Blount v. ***Rizzi,*** 91 S.Ct. at 428.

The Court was able to construe the federal statute in *U.S.* v. *Thirty-Seven (37) Photographs,* 402 U.S. 363, 91 S.Ct. 1400, so as to require a time limit for the bringing of any action and for a final judicial determination as applicable to importers and further stated that limits might vary in different context such as a claim by a state censor that a movie was obscene.

The State of Texas once had a injunctive procedure with built-in procedural safeguards or time limits which permitted no restraining or injunction to be issued except upon notice and the person was entitled to a trial within one (1) day after joinder of issue with a decision to be rendered within two (2) days of the conclusion of the trial. *Moore* v. *State of Texas,* 470 S.W.2d, at 394 fn. 4.

Article 4667 permitting the enjoining of any public nuisance for the commercial manufacture, distribution or exhibition of obscene material has no procedural safeguards and the Texas Rules of Civil Procedure do not provide any built-in safeguards nor has there been any authoritative construction by the Texas courts establishing required procedural safeguards. As stated in *Southeastern Promotions, Ltd.* v. *Conrad,* 95 S.Ct. at 1244, "Invariably, the court has felt obligated to condemn systems in which the excercise of such authority was not bounded by a precise and clear standards."

Appellee, King Arts Theatre takes exception with the statements both in the Jurisdictional Statement and the Brief for the Appellee that procedural safeguards are present in the Texas injunctive process. The State of Texas contends that the language of an injunction and the procedures required for approving violations of the injunction are such that a prior restraint is permissible. The State of Texas notes in its Brief that the District Court Judge in *State* v. *Stambaugh,* attached as Appendix 3 to the Jurisdictional Statement, illustrates the kind of injunction entered pursuant to Article 4667 (a) (3). This injunction indicates the judge's refusal to enter a temporary restrain-

ing order without notice and hearing in an obscenity-oriented injunction proceeding. The State of Texas contends that such an injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint citing three Texas cases. None of these cases can be relied upon as establishing any authoritative construction of procedural safeguards. In *Moore* v. *State,* 470 S.W.2d, 391 and *Richards* v.*State,* 497 S.W.2d 770, the Texas court was operating under the previous Texas injunctive procedure Article 527, Section 13. See, *Richards* v. *State,* 470 S.W.2d at 394 fn. 4. Article 527 of the Texas Code provided for no injunction except upon notice together with a trial within one day after an answer and a decision within two days after conclusion of the trial. These procedural safeguards were repealed. In *Locke* v. *State,* 516 S.W.2d, 949, the Texas court made no decision on any procedural safeguards. In *Locke*, the court stated that no *ex parte* restraining order or writ was issued and the temporary injunction was issued after notice in a form *agreed to* by both *Locke* and the State. There is nothing in this decision requiring a prompt trial upon the merits or a prompt judicial decision. In *Locke* procedural safeguards was referred to by the Court stating that the order restrained only the exhibition of films depicting specific activities in a certain manner so as to be subsequent punishment and not illegal prior-restraint.

Contrary to this Court's holding in *Freedman* v. *Maryland, supra,* the Texas court approved an order that contained an agreed procedure which required *Locke,* the exhibitor, to secure a judicial determination of the protected film or nonprotected status of a film prior to exhibition or test the matter by contempt. Contempt would have certainly been criminal contempt. This placed the burden upon *Locke* to present the matter to the court contrary to the rule that the censor or the state official should present the matter to a court. The theatre owner or exhibitor could test the character of the film in a contempt hearing

and suffer punishment for his past act even though the film had not been determined obscene before the contempt charge was brought.

It is difficult to understand the real nature of the injunction in *State* v. *Stambaugh* quoted in the brief for the State of Texas and in Appendix 3 in the Jurisdictional Statement. The *Stambaugh* injunction was a *permanent* injunction. The court not only enjoined films which exhibited certain conduct as defined in several Texas statutes but enjoined:

> "[A]ny other motion picture, magazine or other materials which contained representation or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or which contained representations or descriptions of masturbation, excretory function and the lewd exhibition of the genitals; all of the aforesaid materials, including those introduced, those that portray deviate sexual intercourse, sexual intercourse, and beastiality and materials of the type immediately as described above."

Such an injunction is extremely broad.

As to procedure, the Texas District Court in the *Stambaugh* case does not indicate whether there will be any contempt charge or not since it states that "in view of the serious constitutional questions that always arise when prior restraints are imposed. . .this court will not entertain in the future in this case or against this defendant any applications for temporary restraining orders without notice to and the opportunity to be heard by the persons sought to be enjoined should the state again seek to proceed under Article 4667." It is unclear therefore, whether the court is requiring for each and every book in the future there must be a hearing to determine obscenity before an injunction could apply or that it is merely stating that for other locations this defendant might occupy, he might require notice.

In any case this injunction is certainly not comparable to the injunction issued several years later in 1978, at the request of Henry Wade, the District Attorney of Dallas County, and Lee Holt, the City Attorney of Dallas. In *Wade* v. *Haddad,* No. 78-2055-C cited in the Appendix and made a part of this Record (A 132) a *temporary* injunction was granted upon notice and there are no procedural safeguards built into that injunction nor into the Texas rules of Civil Procedure for any hearing upon the merits. That temporary injunction was *issued* "pending final hearing and determination of this cause restraining and enjoining defendants . . .from commercially exhibiting . . .any motion picture. . ." which had certain specified conduct. This 1978 injunction is certainly not illustrative of what the State of Texas would assert is a cumbersome weapon. *This is prior restraint on any future publication of unnamed motion pictures, books or magazines without any procedural safeguards either by statute, rules of civil procedure or authoritative judicial construction.*

Without built-in procedural safeguards the Texas public nuisance statute to enjoin the commercial exhibition of obscenity is constitutionally deficient.

B. The State Can Obtain An Ex Parte Temporary Restraining Order For A Ten-Day Period.

The Texas Rules of Civil Procedure, Rule 680, provide that a temporary restraining order can be obtained *ex parte* which shall expire by its terms in ten (10) days. In *Locke* v. *State, supra,* no *ex parte* restraining order was issued, but this is not an authoritative determination that none *could* be *issued*. There is, therefore, no built-in procedure of safeguard which would prevent the enjoining without notice or hearing of the exhibition of a motion picture or the sale or distribution of book, magazine or newspaper under a temporary restraining order. A temporary injunction hearing is available upon request at the earliest practicable date but the prior restraint by injunction without notice is in effect.

C. A Temporary Injunction May Be Granted, Not Only Against Material In Existence, But Future Unnamed Motion Pictures On The Basis Of "Probable Right" To The Relief Sought And That The Evidence "Tends" To Support The Cause Of Action.

The State of Texas asserts that the Fifth Circuit's opinion is in error that in Texas a court granting a temporary injunction merely determines probable right and probable injury. The State of Texas contends that *Moore v. Texas, supra,* and *Locke v. Texas, supra,* examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

In *Moore* v. *Texas, supra,* which considered an injunction against obscene material, the court said:

> "We are guided by certain well established rules in the character of appellate review requiring in passing upon the granting of a temporary injunction. To warrant the issuance of a writ of temporary injunction, the applicant need only show a probable right and a probable injury; he is not required to establish that he will finally prevail in the litigation. . .it is also well settled that our review is limited to the narrow question as to whether the action of the trial court in granting or denying a temporary injunction constitutes a clear abuse of the discretion."
>
> 470 S.W.2d at 392-93.

The Appellate Court in *Moore* stated that the trial court did not abuse its discretion in granting that part of the temporary injunction referring to the specific books and magazines, or enjoining the showing of certain identified films. On the other hand, the court found there was a violation of the Texas Rules of Civil Procedure in the mandatory provisions of Rule 683 in that it did not sufficiently appraise the appellants of the acts they are enjoined or restrained from doing by enjoining similar

material. The injunction generally prohibited the defendants from violating a penal statute without clear, precise or definite guidelines and the injunction against showing *similar items* which were obscene was reversed with the court saying there was no need to rule upon the constitutional issues of prior restraint. In *Locke* v.*State* the court did not change the rule of probable right or probable injury for the granting of a temporary injunction but did state that an independent determination of obscenity would have to be made by the reviewing court. The opinion of the Fifth Circuit Court of Appeals is correct in that under Texas procedure obscenity cases are treated no differently than any other civil case. If the theatre operator is unable to convince an appellate court that the trial court abused its discretion, the injunctive order remains in effect. Such an order is based upon probable right and probable injury and does not comply with the procedures required by this Court that there be notice and an adversary hearing insuring the necessary sensitivity to freedom of expression. The procedure requires a judicial determination to impose a valid final restraint. *Freedman* v. *Maryland, supra; Kingsley Books* v. *Brown, supra; Quantity of Books* v. *Kansas, supra; Blount* v. *Rizzi, supra; Paris Adult Theatre* v. *Slaton, supra.*

D. A Temporary Injunction Does Not Constitute A Ruling On The Merits Or Final Ajudication Of Obscenity *Vel Non* Of Films In Existence, Nor Ajudication That All Such Films With Similar Conduct Are Obscene.

As stated in the previous section, a temporary injunction is not a final ruling on the merits.

A temporary injunction is just that, temporary. There is no provision in the Texas procedure nor any authoritative construction that, as required by *Kingsley Books* v. *Brown, Freedman* v. *Maryland* and others, there must be a trial upon the merits and that any temporary injunction is only to maintain the status quo for the shortest period possible. As stated by the

Fifth Circuit, since the burden at that stage is probable right and probable injury, a party is not entitled to a full blown determination of obscenity and the hearing on a temporary injunction is substantially different from that afforded at a final hearing on the merits. *Freedman* v. *Maryland, supra,* requires any restraint imposed in advance of a final judicial determination on the merits must similarily be limited to preservation of the status quo for the shortest fixed period compatable with sound judicial resolution. 85 S.Ct. at 739. The temporary injunction under the Texas procedures has no procedural safeguards built-in and renders a statute unconstitutional.

E. Any Appeal Of A Temporary Injunction Does Not Go The Merits Of Any Past Of Future Obscene Material But Whether The Trial Court Abused Its Discretion In Granting The Temporary Injunction.

The Fifth Circuit reviewed the rules in Texas on an appeal from a temporary injunction. In *Locke* v. *State, supra,* the court was determining constitutional challenges. In *Moore* v. *State,* 470 S.W.2d 391, the Texas court said it was well settled that its review was limited to the narrow question of whether the trial court's action in granting or denying the temporary injunction constitutes a clear abuse of discretion.

Procedural safeguards, however, are not normally keyed to what grounds may be considered on an appeal of a temporary injunction. The purpose of procedural safeguards is to *limit the status quo or temporary injunction* to the shortest time permissible with judicial discretion. Since Texas has no method for establishing a trial immediately upon the merits, the consideration of what may be considered on an appeal from a temporary injunction is further evidence of the lack of procedural safeguards requiring the statute to be held unconstitutional for such deficiencies.

F. There Is No Provision For Prompt Final Hearing On the Merits.

G. There Is No Provision For a Prompt Judicial Determination.

Procedural requirements for a prompt final hearing on the merits and a prompt judicial determination are closely associated in the cases. Each is a necessary element. There is nothing in the Texas statute nor in the Texas civil procedure which would treat an obscenity case any differently than any other civil case as was pointed out by the Fifth Circuit. *See,* 587 Fed.2d at 171. The quotation from *Grove Press Inc. v. Philadelphia,* 418 Fed.2d 82, is very appropriate in that a preliminary or temporary injunction may last for days, even months, before a judicial decision on the merits.

Kingsley Books Inc. v. Brown, supra, has been cited many times as the model. This New York statute required a hearing on the merits within one day after answer and a decision within two days of the conclusion of the trial. While the Court might not consider this as binding in all other situations, it is a clear indication that there must be a provision for a prompt final hearing and a prompt judicial decision.

The Court in *Freedman v. Maryland, supra,* in discussing a censorship statue and the necessity for the censor going to court also determined that the procedure must assure a final judicial decision as well as the shortest fixed period compatable with sound judicial resolution for a determination on the merits. *See,* 85 S.Ct. at 739. *Marcus v. Search Warrant of Property,* 367 U.S. 717, 81 S.Ct. 1708, contrasted the Missouri statutory scheme with the New York statute in *Kingsley Books.* The New York statute required a decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction in contrast to the Missouri scheme which had no time

limitation and was held unconstitutional. This Court further declared in *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, that it has tolerated a system of prior restraint "only where it operated under judicial superintendants and assured an almost immediate judicial determination of the validity of the restraint." 83 S.Ct. at 639.

In *Teitel Film Corporation* v. *Cusack,* 390 U.S. 139, 88 S.Ct., 754, an Illinois censorship law was held unconstitutional for among other reasons that the procedure did not assure a prompt judicial decision. Likewise this court in *Blount* v. *Rizzi,* not only placed the burden of initiating judicial proceedings upon the government but required a prompt judicial review; that is, a final determination on the merits within a specified brief period. In *Quantity of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, the Court said that the teaching of *Kingsley* v. *Brown* involved the need of procedures and commented "the New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard.' " 84 S.Ct. at 1725.

Finally this Court in *Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 95 S.Ct. 1239 indicated that while *Freedman* v. *Maryland* was a administrative censorship system, this Court has applied *Freedman* to the judicial procedures by which federal custom agents seized imported materials and to the procedures by which postal officials restrict the use of mail. The court determined that there was a need for a prompt decision after any temporary injunction such as was required in *Kingsley Books* v. *Brown* and a prompt judicial determination. The court said:

> "Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured."
>
> 95 S.Ct. at 1247.

The reasoning of these cases is likewise applicable to the need for procedural safeguards built into the Texas statute. There is nothing to prevent an obscenity case from being treated just as an ordinary civil case. Not only may the temporary injunction be granted but there is no provision that after the injunction has been granted there will be a prompt final hearing on the merits and a provision requiring the court to render a prompt decision. Lack of these procedural safeguards requires the Court to affirm the Fifth Circuit that the Texas Statute 4667(a)(3) is unconstitutional.

H. Past Exhibition or Distribution As Well As Continued Exhibition or Distribution of Any Unidentified Materials Presumed Protected By The First Amendments Subjects The Person To a Criminal Contempt Charge Even Though The Injunction May Be Erroneous But Not Void, and the Unnamed Book, Magazine or Film Has Not Been Determined Obscene Before Issuance of the Contempt Charge.

The State of Texas in its brief repeats an extraordinary statement made in the Jurisdictional Statement. The State of Texas asserts that "each alleged violation of an injunction must be shown by proof by the complainant; and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material."

There is nothing in the statute or the Texas Rules of Civil Procedure or in any general statute defining contempt (Art. 1911 A) which justifies such an assertion. It is contrary to decisions of the Texas court construing the remedy of contempt. The State of Texas quotes Rule 692 of the Texas Rules of Civil Procedure on disobedience of an injunction but leaves out the following phrase of the Rule:

> "[d]irected to the sheriff or any constable of any county, and requiring such officer to arrest the person bearing name if found within his county and have him before the court or judge at the time and place named in such writ; "

The State of Texas would appear to assert that a petition for contempt would always be by a show cause order, not by attachment and arrest, and that there would be no punishment for past exhibition.

The State of Texas would assume that upon issuance of a citation that a certain book magazine or motion picture was in violation of the injunction, there would merely be a determination of whether or not the material was obscene and thereafter the theater operator of bookstore operator, by promising not to show this material or sell the book or magazine, would be purged of any contempt and not suffer any punishment either under a civil contempt or a criminal contempt. A better procedure is to file for an injunction under a procedure like that approved in *Kingsley Books* rather than a blanket injunction for future unidentified material and assume such a judicial attitude exists for any alleged contempt charge.

If any distributor or exhibitor of materials subsequently found obscene could be assured by judicial interpretation or by a plainly written statute of the State of Texas that a citation for contempt would be filed only by state authorities and not by private individuals and that the only thing necessary to purge the exhibitor of contempt, if the material were then found obscene after notice and adversary hearing, would be to agree not to exhibit or sell the offending material, the statute would be similar to an injunction against identified existing materials provided in *Kingsley Books* v. *Brown*. The only objections would be the lack of procedural safeguards.

There can, however, be no *promise by the State Attorney General of Texas* which would be binding upon all of its courts, both district and appellant. This would require what the Appellate Court in Texas in *Richards* v. *State, supra,* has sought to eliminate; that is, the necessity for a filing of a complaint each time the state sought to enjoin a particular magazine, motion picture or book. A new statute outlining such a promise with procedural safeguards inserted would have to be passed.

King Arts Theatre, or any motion picture exhibitor or bookstore operator faced with an injunction which enjoined showing a future unnamed motion picutre, book or magazine which has certain specified conduct and is obscene under the tests in the Texas statute, faces criminal contempt charges with a maximum fine of $500.00 and imprisonment for six months.

The motion picture theatre operator cannot purge himself of contempt by stopping continued exhibition. The film has been shown to customers and the past exhibition cannot be erased. Likewise, a book which has been sold to a customer cannot be returned so that the bookstore could purge itself of contempt by attempting to recover the book from an unknown customer. It has been sold. A petition for contempt would be *criminal contempt* or at least *combined civil and criminal* contempt in that the Court could punish for past conduct as well as require a future promise of obedience.

Texas follows the accepted definition of civil and criminal contempt. In *Ex parte Werblud,* 536 S.W.2d 542 (1976), the Supreme Court of Texas discussed criminal and civil contempt as follows:

> "The purpose of civil contempt is remedial and coercive in nature. A judgement of civil contempt exerts the judicial authority of the court to persuade the contemptor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemptor 'carries the keys of (his) prison in (his) own pocket'. . .in other words, it is civil contempt when one-'~~may procure~~ his release by compliance with the provisions of the order of the court' . . .this is the settled rule in Texas.
>
> "Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemptor is being punished for some completed act which affronted the dignity and authority of the court."
>
> 536 S.W.2d at 545.

The Texas court in *Ex parte Hosken,* 480 S.W.2d 18, stated:

> "Ordinarily, the punishment is fixed and definite and no subsequent voluntary compliance on the part of the defendant can enable him to avoid punishment for his *past* acts.
>
> "In some instances, the proceeding partakes of the nature of both. Thus, when the court imposes fine or imprisonment for violation of a child support order, it is punishing for yesterday's contemptuous conduct. This is essentially criminal. When it adds the coercive sanction of imprisonment until the order is complied with, it is announcing the consequences of tomorrow's contemptuous conduct. In the latter instance, the contempt is civil in nature." (Emphasis supplied)
>
> 480 S.W.2d at 23.

Texas also recognizes the well-established rule that civil contempt or imprisonment cannot be specified when it is not within the power of the person to perform the act which alone will purge him of contempt. The court could not imprison the person for an indefinite term, which is permissible under the remedial part of civil contempt, but may only punish by criminal contempt. *See, Ex parte Dewees,* 210 S.W.2d 145.

Any citation for contempt would be criminal contempt or both criminal and civil contempt. The book would have been sold or offered for sale. The motion picture would have been shown. It is doubtful that a citation for contempt could always be issued before a motion picture was shown or before a book was sold. The Texas court would thus have both civil and criminal contempt. It would be authorized to punish up to the maximum amount of a $500.00 fine and six months in jail, without a jury trial, and without the usual benefits of any

criminal proceeding. It would further have the power of civil contempt to require the film not to be shown in the future. A promise not to show the film or the action of taking the film from the screen or taking the book from the bookstore would probably comply with the civil contempt. However, the past act would have been completed and criminal contempt would always be available since it would be impossible to erase the previous showing of the movie or to recover all copies of a book so'd to customers who might not voluntarily part with it.

Most importantly, there would have has been no determination *before* the *contempt charge* that the motion picture is obscene. The person could be charged and faced with imprisonment for contempt because of some past exhibition or distribution of an unidentified film, book or magazine, even though such unnamed book, magazine or film had not been determined obscene before the issuance of the contempt charge, thereby depriving the person of the procedural safeguards necessary before such an injunction would have been issued.

The decision of the Fifth Circuit Court of Appeals that Article 4667 (a) (3) is unconstitutional as lacking procedural safeguards should be affirmed.

3. Such a State Statute is Unconstitutional Under the First and Fourteenth Amendments Because it Authorizes the Entry of an Injunction Restraining the Exhibition of Unidentified Fims Under a Public Nuisance Doctrine and, Therefore, Authorizes the Imposition of Absolute Liability in the Form of Criminal Contempt for the Exhibition of an Obscene Film.

This Court has stated many times that any system of prior restraint comes to this Court bearing a heavy presumption against its constitutional validity. The presumption against prior restraints is heavier - and the degree of protection broader -than that against limits on expression imposed by criminal penalties. Behind the distinction is the theory deeply etched in our law: a free society prefers to punish the few who abuse

rights of speech after they break the law than to throttle them and all others beforehand. While there may be narrowly defined exceptions to the prohibitions against prior restraint, this Court has always determined that *only a judicial determination in an adversary proceeding insures the necessary sensitivity to protect freedom of expression.*

This Court has looked to the practical operation of a system. The Fifth Circuit Court of Appeals cited Judge Aldisert in *Grove Press, Inc.* v. *Philadelphia,* 418 F.2d 82. Judge Aldisert comments upon the doctrine of public nuisance and states:

> "What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under 'a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.' *Cantwell v. Connecticut,* 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.ED. 1213 (1940).
>
> "The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as a vehicle for its restraint.
>
> "Accordingly, we agree with the conclusion reached by the district court as to the invalidity of utilizing a theory of public nuisance alone to enjoin expression."
>
> 418 F.2d at 88.

Even though the California court held an injunction could only be against named films before the court, Justice Tobringer in his dissent in *People ex rel Busch* v. *Projection Room Theater,* 550 P.2d 600, stated:

"The sword of public nuisance is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate spear of the First Amendment where legal overkill is fatal."

550 P.2d 620.

The California Supreme Court in *People* v. *Projection Room, supra,* had determined that the nuisance statute declaring as a nuisance anything which is injurious to health or is indecent or offensive to the senses might be used to abate "particular books or films which have been adjudicated obscene during a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." 550 P. 2d at 610. That same Court had said that an injunction "must be proper and suitable" to the facts of each case and that a proper and suitable injunction would be only an injunction of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. See 550 P.2d at 609. The Court further stated that it emphasized the proceedings were only at the pleading stage and that the Complaint was sufficient to state a cause of action based upon a general nuisance theory. The provisions on closing a theater were held unconstitutional.

This Court in *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 95 S.Ct. 1239, in commenting on the perils of prior restraint by refusing to allow the performance of a play which would also be applicable to future unnamed and unidentified books, magazines or motion pictures stated:

"The perils of prior restraint are well illustrated by this case, where neither the board nor the lower courts could have known precisely the *extent of nudity or simulated sex* in the musical, or even that either would appear, before the play was actually performed."
(Emphasis supplied)

95 S.Ct. at 1248.

In Texas, as in California and generally, the legislature determines a definition of nuisance, but what constitutes a nuisance is a justiciable question. As stated in a recent opinion by Judge Taylor of the Northern District of Texas in *Ellwest Stereo Theaters, Inc., of Texas* v. *Byrd, et al.,* 472 F. Sup. 702:

"It is ancient law that public nuisances may be enjoined. But the Texas courts have held that legislative bodies may only define a nuisance, whether or not a particular use constitutes a nuisance is a justiciable question."

472 F.Sup. at 706.

Likewise, Justice Tobringer in *People ex rel Busch* v. *Projection Room Theater, supra,* called public nuisance a remedy designed for those rare cases where any delay would concretely imperil the public interst. He comments that if a city attorney can find a single judge who believes the material is obscene, he can permanently curtail the public's right to read books, magazines or view motion pictures. He further states that courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the legislature declares. *See* 550 P.2d at 613.

The Texas court in *Richards* v. *State of Texas,* 497 S.W.2d 770, held that the state has the right to chart is own course and that equity should be "able to fashion the remedies necessary to the public welfare." *See* 497 S.W.2d at 780. The Texas court was unwilling to concede the State must bring suit each time nor to tie the hands of the Chancellor that he may not prohibit future conduct of the nature shown to have been done *solely in the pursuit of profit.* While the Court recognized the case was not free from doubt, it would allow an injunction against specified conduct in future films until overridden. The Texas Court in *Richards* also reached the conclusion that any film which protrayed sexual intercourse or the other items specified are, of course obscene, stating:

"However, it is obvious that films explicitly portraying sexual acts as described in Section (c) of the decree are obscene."

497 S.W.2d at 779.

The Texas court is clearly wrong. Sex and obscenity are not synonymous.

The use of public nuisance or injunctions in equity in a sensitive area such as First Amendment raises extreme practical problems. As stated by Justice Exum in his dissent in *State ex rel Andrews v. Chateau X, Inc.*, 250 S.E.2d 603 (N.C. 1979), injunction is totally antithetical to any notion of free speech because:

"Once the expression is made it is an accomplished fact upon which it is permissible for courts to act as in other criminal cases. If the expression be illegal, those responsible can be held accountable. This notion inheres elsewhere in the law in the familiar doctrine of admittedly uneven application that equity will not enjoin a proposed criminal act on the ground that there is a complete remedy at law if the act is committed."

250 S.E.2d at 620.

A general principle on the use of equity in criminal or immoral matters is stated at 27 Am.Jur.2d, Equity §56, p. 578, as follows;

"The general principle is well settled that equity has no jurisdiction in criminal or immoral matters which do not affect property. It is not the mission of equity to administer the criminal law or enforce morality or religion except where incidental to the enforcement of property rights."

Public nuisance statutes usually refer to property such as odors, use of property for the sale of intoxicating liquors, or as a house of prostitution or other matters in which there may be a crime involved, but equity is involved with the enforcement of a property right. Here the enjoining of the sale of future issues of unnamed publications is not for the benefit of some public property right or special injury to a person, but is used to enforce a criminal statute.

It is further clear that the use of an injunction against a future unnamed publication which may be held obscene in a contempt hearing is both *criminal contempt* and *civil contempt*. The offender may be punished for past acts which is subsequent punishment. He further may be enjoined from future exhibition which would be a civil contempt if the person refused to agree to obey the injunction, and in fact, could be kept in jail until the motion picture film, book or magazine were surrendered or had been taken from the bookstore or screen.

The offender is likewise not only subject to a contempt action, but may also be charged with the criminal offense of exhibition of the motion picture or distribution of the book or magazine. The offender would be served a show cause order for contempt, as well as being arrested for violation of the criminal law with various procedural problems, which may arise in trying to defend both actions at the same time.

The question raised is whether an injunction describing material in the abstract by use of the statutory definition of obscenity and certain specified conduct in its practical operation a prior restraint when applied to unidentified motion picture films, magazines or books acquired in the future by the distributor or exhibitor. The person is subject not only to criminal charges, but to contempt if they should violate the injunction by possessing any of these generically described items which might later be judicially determined in a contempt proceeding to fit within its proscription.

T. Emerson was quoted by Justice Brennan in his concurring opinion in *Nebraska Press Association* v. *Stuart, supra,* that a system of prior restraint is in many ways more inhibiting than a system of subsequent punishment. This was cited by Judge Fitzgerald in *Spokane Arcades, Inc.*, v. *Ray,* 449 F.Sup. 1145 (E.D. Wash. 1978), when Judge Fitzgerald held a statute attempting to apply public nuisance to motion pictures and books in Washington unconstitutional. Professor Emerson in that same article comments upon the use of injunctions and points out some of the practical problems of operation of an injunctive sytem and why such an injunctive system would be an impermissible and unconstitutional prior restraint.

Professor Emerson spoke of the statute in *Near* v. *Minnesota,* 283 U.S., 697, 51 S.Ct. 625 and said that on paper it was a system for subsequent punishment by contempt procedure:

> "But in practice, the system was bound to operate as a serious prior restraint. Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal procedure, for infraction of a loose and illusive mandate. Under such circumstances, any publisher seeking to avoid prison, would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to censor. The judge, would, in effect, become a censor.
>
> "Thus, the Court made clear that it was not interpreting the concept of prior restraint on a narrow legalistic or historic basis. It was, as it said, testing the statute by its 'operation and effect'."
>
> *T. Emerson, The Doctrine of Prior Restraint,* p. 654.

Professor Emerson concludes in his Article as follows:

> "As to the judicial form of prior restraint, similar considerations apply. Where the injunction or other judicial process prohibits only certain kinds of communication, as in *Near* v. *Minnesota,* the judicial officer tends to be in the same position as an executive officer. Where the injunction prohibits all communication, the element of individual control is eliminated or minimized, but the restraint includes lawful as well as unlawful communication. In either case, the restraint is pervasive and should normally fall within the rule."

The use of public nuisance against unidentified future motion picture films, books, magazines and even newspapers is a prior restraint which does not meet constitutional standards which require at least a judicial determination and an adversary hearing before there could be a restraint.

A. There Can Be No Prior Restraint On Future Publication of an Obscene Expression in a Civil Proceeding Without Notice and Judicial Determination in an Adversary Hearing Before Suppression.

The Fifth Circuit Court of Appeals' reasoning in the majority opinion is sound that you cannot issue a blanket ban on the showing of films that have not been judicially declared obscene and render it unobjectionable by the interweaving of threads of language from obscenity statutes. The end result is a sweeping prohibition against the screening of films with sex or nudity in general. The Court of Appeals is correct that incorporation of the statutory definity of obscenity and a listing of forbidden acts or acrobatics merely begs the question because no one in advance of a final judicial ruling has the omniscience to determine in advance whether a film is legally obscene. The court is correct that many of the acts may eventually be held not obscene since the work must be taken as a whole and since contemporary community standards must be applied by the fact finder.

The question can be stated over and over as to whether there can be a prior restraint of future publication of an obscene expression in a civil proceeding without notice and adversary hearing after the initial publicaton of that material. We believe the answer must be no when attempting to apply the public nuisance statute authorizing an injunction against future acts. The teaching of the cases of this Court from *Kingsley Books* v. *Brown, supra,* to date is that only after an adversary hearing when the Court is able to read or examine the publication and acts judicially to enjoin its distribution is there no prior restraint. Only after an adversary hearing and notice can you enjoin a publication and not some blanket ban for the future. *Kingsley Books* v. *Brown* states that the New York court refused to enjoin future issues. In fact, in *Burke* v. *Kingsley Books,* 208 Misc. 150, 142 N.Y.S.2d 735, held that when the court is able to read and examine the publications and acts judicially to enjoin their distribution, there is no previous restraint. This Court refers to the trial judge in *Kingsley Books* in *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, fn. 28 and further indicated that the restraint in *Kingsley Books* ran only against the named publication and was not a catch-all restraint against the distribution of all obscene material.

This Court has pointed out that in cases such as *McKinney* v. *Alabama* and *Paris Adult Theatre* v. *Slaton, supra,* that a finding of obscenity in a civil action under certain circumstances might be in the best interest of all in that no criminal action could be brought unless there was further exhibition or distribution *after the civil action.* North Carolina adopted a statute that no one can be prosecuted until the material has first been determined to be obscene. But North Carolina has adopted a nuisance statute which carries with it a possibility of contempt. See, *State ex rel Andrews* v. *Chateaux, Inc.,* 250 S.E.2d. 603. We believe, as stated in the dissent of that case, that a judge cannot know material is obscene until they see it. To be dealt

with judicially, it must first be judicially seen and, therefore, an injunction describing conduct in the abstract by use of the statutory definition of obscenity would be an impermissible prior restraint. The reasoning is that there must be an adversary hearing and judicial determination of obscenity before the matter may be restrained for the future. This is the further reasoning of the court in Louisiana in *Gulf States Theatres of Louisiana, Inc.* v. *Richardson, supra,* where that court states that a thorough consideration of the cases by the Supreme Court leads it to conclude that in a civil proceeding to abate an obscene expression as a nuisance there can be no prior restraint without an adversary judicial adjudication. The Louisiana court further reasons that an evidenciary hearing and judicial determination is required before an expression which is obscene can be suppressed, prohibited or restrained even before it is published, exhibited or in any way communicated because suppression should not be had but without notice and a hearing.

In *Quantity of Books* v. *Kansas, supra,* this Court said:

> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public to a free society to unobstructed circulation of nonobscene works."
>
> 84 S.Ct. at 1727.

We contend that an injunction applicable to future films is similar to and as chilling as a seizure without a hearing.

We likewise construe the court's cases of using sensitive tools to determine obscenity and that an injunction which can be fashioned in any language as a judge desires is not the sensitive tool needed for dealing with obscenity. A statute which can be used against protected as well as unprotected expression must require proper notice, a hearing and a judicial determination before material not yet communicated can be restrained. Authorization of the use of public nuisance would not crack the

door but remove the door from its hinges. We do not believe that the bulwarks necessary to protect free expression should be so extended as to permit criminal prosecution under the guise of contempt and that the Court's limited exception for injunctions under *Kingley Books* should not be extended.

We assert that no injunction should affect any material until that particular material has been presented to the Court and in an adversary and evidenciary hearing and there has been a judicial determination of obscenity. Only if there is continued exhibition in the future of the material adjudged obscene could there be any action for contempt. Any lesser requirement would be a prior restraint in violation of the First Amendment.

B. The Texas Statute Permits Private Individuals as Well as Government Officials to Bring Suit.

The Texas Nuisance Statute permits any citizen to sue in his own name and does not require to show that he is specially injured by the acts complained of.

This Court can recognize that this expands the doctrine of public nuisance to eliminate that the person be required to show special injury and opens up the challenge to First Amendment rights to any organization or individual who chooses to harass another. A private individual could bring a nuisance action against a book publisher, a newspaper, a bookstore, a motion picture theatre, a newstand or any other manufacturer, distributor or exhibitor of material presumed protected by the First Amendment and alleged past acts of obscenity and possibly obtain an injunction against unnamed future publication.

That same individual may thereafter file petition after petition to cite the theatre, bookstore or other entity for violation of the injunction. The private individual would become a censor without benefit of an appointment to any official position.

The practical effect of this prior restraint is obvious.

Prior restraint would not only exist by actions of private individuals but local officials during periods of election or during periods of publicity concerning any particular book, motion picture or magazine. They would be tempted to act on the basis of alleged concern for their particular community without regard to the rights guaranteed by the first Amendment.

An example of an action by public officials in a criminal action is *Jenkins* v. *Georgia,* 418 U.S. 153 94 S. Ct. 2750. The local officials charged the defendants were exhibiting an obscene film "Carnal Knowledge," which this Court held as a matter of law was not obscene. In *Gulf States Theatres of Louisiana, Inc.* v. *Richardson,* 287 S.2d 480 (1974), after several seizures of the film "Last Tango in Paris," which the theatre operator resisted by going to appellate courts, the officials sought to enjoin further showing of the film under the nuisance statutes. The film "Last Tango in Paris," which had been shown throughout the United States to millions of individuals, was attacked in this Louisiana municipality as being obscene and was so held and enjoined by the Court.

We believe the Louisiana court was very astute in holding that there was no corollary between control of the nuisance of prostitution and control of expressions which are subject to regulation only when they cross over that fine line into obscenity. The Louisiana court was faced with a statute which required closing of the theatre. The State of Texas does not even contest the fact that such a construction of the Texas statute would also be unconstitutional.

This Court has determined in cases involving search warrants that the duty of the judge is to be a neutral and detached judicial officer. *Lo-Jo Sales, Inc.* v. *New York* *U.S.* , 99 S.Ct. 2319. The judge in a contempt action would be acting as a censor since he acted in the first place in authoring an injunction outlining whatever specific conduct *he determined* would be obscene if portrayed upon the screen.

The private individual or the public official in bringing the action for an injuction would also request the court to determine that *any* conduct which could be considered obscene should be in the injuction of the court.

The Court is left to its discretion under the construction urged by the State of Texas that not only actual sexual acts but simulated sexual acts could also be listed in the injunction and be prohibited by the Court. Such simulated sexual acts, if shown in any unnamed motion picture in the future, could thereupon be determined to be obscene and absolute liability of contempt imposed.

Any book, magazine or film that dealt in any way with sex or in which simulated sex or in which simulated sex acts to any extent were portrayed could be subject to a contempt charge either by petition by the private citizen or public official or by the judge on his own motion. This would certainly chill the exercise of First Amendment rights.

The effect of such a prior restraint would be as much as licensing statutes whereby the license to do business would be revoked because of past conduct violating the First Amendment.

The practical operation of a statute allowing a private citizen without injury as well as public officials to bring suits for injunction in which the judge has unbridled discretion to enjoin any sexual conduct which he would determine in the future was obscene is impermissible prior restraints and the essence of censorship.

C. Motion Picture Films As Commerical Speech Are Protected By the First Amendment

The Texas Court in *Richards* v. *State,* 497 S.W.2d, 770, as do other states courts from time to time, comments on the fact that the distribution of motion picture films is for profit.

Newspapers, books, magazines, motion picture films as well as other activities under the First Amendment are commercial speech and for profit and enjoy the protection of the First Amendment just as political speech.

This Court had the question of commercial speech squarely before it in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 96th S.Ct. 1817. The Court determined that freedom of speech presupposes a willing speaker and the protection afforded to the communication is also afforded to its source and to its recipient's both. The right to receive information and ideas necessarily protects the right to receive.

The Court pointed out that speech does not loose its protection under the First Amendment because money is spent to project it as in paid advertisements of one form or another or even though sold for profit citing motion picture cases and book cases involving questions of obscenity.

The distribution of motion pictures, books, magazines and newspapers even though sold as a money making enterprise are entitled to protection under the First Amendment. Such an occupation is not unlawful. It is only when the material loses the protection of the First Amendment by being obscene that action, primarily criminal action, might be taken. A limited junction procedure in *Kingsley Books* v. *Brown* might be available. In either case it is subsequent action by notice and a judicial determination in an adversary hearing that restraint is imposed or punishment inflicted. Prior restraint on free speech even though commercial would have the practical effect of self censorship. As stated by this court in *McKinney* v. *Alabama,* 424 U.S. 669, 96th S.Ct. 1189 and *Freedman* v. *Maryland,* 380 U.S. 51, 85 S.Ct. 734, the stake of the distributor or exhibitor may be so small as to be unwilling to accept the burdens and delays of litigation in a particular area when he may freely exhibit his film in most of the rest of the country. The Constitution cannot

force anyone to exercise the freedom of expression which it guarantees. On the other hand those who afforded the opportunity should not be required to suffer until there has been notice and a judicial determination and an adversary hearing before there can be any restraint.

If there is uncertainty because an existing injunction under most circumstances less rather than more communication of ideas will exist. As stated by Juctice Brandeis in his concurring opinion in *Whitney* v. *California*

> "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."
>
> 274 U.S. at 378.

D. A Nuisance Statute May Also Apply to Newspapers As Well As Motion Pictures, Books and Magazines

The Texas nuisance statute could be applied just as the statute was in *Near* v. *Minnesota,* 283 U.S. 696, 51 S. Ct. 625 to Newspapers. An injuction could be issued because of past issues of a newspaper if a private citizen as well as a state or municipal official brought a petition and one judge determined that past issues of a newspaper had been determined to be obscene.

This is not a farfetched assumption since this Court in *Kois* v. *Wisconsin,* 408 U.S. 229, 92 S.Ct. 2245 had to reverse two convictions for disseminating an alleged obscene picture and an alleged obscene poem in an underground newspaper. This is not the first case since other newspapers in college towns have been charged in other cases.

This Court had to reverse not only the trial court but the Supreme Court of Wisconsin that the dominant theme of the newspaper or the poem did not appeal to prurient interest and reversed the conviction.

The freedom of the press of newspapers is rendered subject to the practical operation of injuctions and contempts by officials or private citizens by statutes by such as the Texas statute against the commercial distribution of obscenity.

E. The Texas Nuisance Statute Against Commerical Manufacturer Would Be Applicable Against Book Publishing or Printing Houses or Any Manufacturing of Material Presumed Protected By the First Amendment.

Any printing house could be charged by a public official or a private citizen that a book or magazine printed for an author in the past had been obscene. An injunction could be issued by a judge and the printing house would be subject to contempt charge in the future. Any individual could be fined and imprisoned or any corporation fined if it was determined that any future publication contained any of the specified conduct listed in the injunction was obscene. A judge would not only determine at the contempt hearing if the new material was obscene but based upon this factual determination and lack of self censorship by the publisher that punishment would be rendered. Any book publisher which published books, poems or magazines would have to use a form of self censorship or face absolute liability for contempt if that future publication were found obscene since the publisher would have knowingly published the material and knew or should have known of its contents.

This system of prior restraint in practice or in practical operation is a serious prior restraint.

F. Obscenity Elements Are Questions of Fact to Be Measured By Contemporary Standards of the Community.

While this Court has determined that the criminal elements of the crime of obscenity are not vague or indefinite, the Court has stated that what appeals to the prurient interest or what is

patently offensive are questions of fact to be measured by contemporary standards of the community. *Smith* v. *United States,* U.S. 97 S.Ct. 1756. In *Smith,* this Court stated:

> "The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to prurient interest is one such question of fact for the jury to resolve. The Miller opinion indicates that patent offensiveness is to be treated in the same way. . . . The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked."
>
> 97 S.Ct. at 1763-64

The Court further went on to say:

> "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated."
>
> 97 S.Ct. at 1764.

We submit that not only would it be difficult for the judge to make that determination according to contemporary community standards but that it would be impossible for the judge in an injunction order to freeze the definition of contemporary community standards. Otherwise, the injunction is not to exhibit certain sexual conduct which the Court might in the future find to be obscene if it were presented to him. If the Court so found it to be obscene, the person would be guilty of contempt of court and not merely subject to a charge of violating the criminal law.

The motion picture operator does not have the right to present to a jury for consideration what are contemporary community standards and have that jury make the judgment. The operator is facing a judge who labeled the depiction of certain sexual conduct obscene per se. Sex and obscenity are not synonymous. Just as Justice Stephens said in the dissent in *Smith,* there are serious well intentioned people who are persuaded that explicit sexual material serve a worthwhile purpose as well as the fact that the demand for comparable materials indicate that the materials do provide amusement or information or at least satisfy the curiosity of interested persons.

Justice Brennan in his concurring opinion in *McKinney* v. *Alabama, supra,* stated the Court recognized in *Miller* the complexity of the test of obscenity and the vital necessity in its application of safeguards to prevent the denial of the protection of freedom and press from non-obscene materials. He further pointed out that the prior restraint increases the possibility of an erroneous determination because the material may never be available to the public and thus "never have truly faced the acid test of acceptance under prevailing community standards." If there is to be an injunction with a chilling effect against future material which contains certain explicit conduct, that material may never have had the chance to have public acceptance under prevailing community standards but be inhibited and chilled because of the injunction against the person and the possibility of contempt action.

G. Injunctions Against Future Publications Promote Uneven and Improper Applications.

The State of Texas contends that an injunctive order against future unidentified films is not an imposing weapon and is cumbersome and ineffectual. We strongly disagree.

Such an injunction is subject to wide-spread abuse. The injunction suggested by the State of Texas as compared to the in-

junction sought later and received by Henry Wade, the District Attorney of Dallas County, are different. The Dallas injunction is broader and its recitation of specific conduct tracts the language of the obscenity statute.

There is no specificity as required by Texas Rules of Civil Procedure that an injunction be definite in its terms. Specific sexual conduct in an injunction is not necessarily obscene but must be judged just as every motion picture is judged on its own merits and in its context. It must appeal to the prurient interest and be patently offensive when considered in relation to contemporary community standards prevailing at the time.

An example of the abuse of an injunction against unnamed future films is in the State of Tennessee, where the Tennessee Supreme Court in 1967 in *New Riveria Arts Theatre, et al.* v. *State of Tennessee ex rel Davis,* 412 S.W.2d 890, determined that the statute did not permit an injunction against unnamed future films. Nevertheless, a local criminal court in Knoxville, Tennessee issued an injunction against any film which depicted certain sexual conduct. *News Mart, Inc.* v. *State ex rel Webster,* 561 S.W.2d 752 (1978). The Tennessee Supreme Court determined that the injunction was beyond the power of the statute and that such a construction of the statute would vest in the courts an unlimited power of prior restraint on freedom of speech and press. Nevertheless, while said injunction was on appeal, V.S.D., Inc. and several of its employees were charged with twenty-six (26) acts of contempt of showing motion pictures in violation of the injunction. The penalty for contempt in Tennessee is ten (10) days in jail and a Fifty Dollar ($50.00) fine. The court sentenced each of the employees to ten (10) days consecutively or 260 days plus a Fifty Dollar ($50.00) fine on each count. The Court is aware of the rule that an injunction must be obeyed even though issued in error except where it is void from lack of jurisdiction. The Court of Appeals of Tennessee reversed the contempt convictions on future unnamed films, which convictions had been based upon affidavits of the

officers presented with the show cause order and testimony of the officers as the contents of the films which were not produced in evidence. *V.S.D., Inc., et al.* v. *State of Tennessee ex rel Webster,* S.W.2d (No. 502 Ct.C.A., Aug. 14, 1978). A number of the cases which were cited by the Fifth Circuit Court of Appeals where injunctions had been reversed also bear out the abuse of such an injunctive process.

Where so much chance exists for mischief, the use of public nuisance statutes as a tool for the control of obscene publications in the future is not sensitive enough to withstand the test established by this Court for dealing with obscenity and is an impermissible prior restraint.

H. The Statute Permits Unlimited Discretion of the Court in Framing an Injunction.

The State of Texas would state that a court could identify specified sexual conduct which, if shown and which otherwise was obscene because of violation of the elements of the offense of obscenity, would be prohibited in an injunction.

The trial judge in issuing a temporary or a permanent injunction would thereby be permitted under the definition of *Miller* v. *California,* 413 U.S. 15 93 S.Ct. 2607, to state in the injunction that patently offensive representations or descriptions of ultimate sexual acts, actual or simulated, or exhibition of the genitals which otherwise are obscene under the definition in criminal law would be enjoined. The language which might be expressed in an injunction is unlimited and becomes prior restraint or censorship against future unnamed publications subjecting a person to absolute liability of contempt if the Court at a later date found that such a publication had been exhibited or distributed and was obscene.

I. Public Nuisance is Coming in the Back Door Against First Amendment Rights.

The use of an injunction against future publications is prior restraint and not subsequent punishment and is coming in the back door against First Amendment rights. Because of past actions an injunction is issued. The injunction is issued not on the basis of a conviction of selling or distributing obscene material where the proof has been established that the person was guilty beyond a reasonable doubt. The injunction is issued on the basis of past conduct and states that if the person distributes or exhibits material in the future which contains certain sexually defined conduct, which also appeals to the prurient interest, is patently offensive and without serious value so as to be obscene, then the person shall be guilty of contempt and subject to punishment. This is an inherent threat of censorship and the Court should now not allow this abuse of the freedom of speech guaranteed by the First Amendment. Public nuisance was intended for police power regulation of prostitution, gambling, illegal liquor as well as obnoxious odors and other common law applications of a nuisance. The particular existing conduct is enjoined as a public nuisance and the continuance *of that particular conduct,* such as prostitution or gambling, is enjoined. A motion picture, a book or a magazine, however, is individually judged on its own merit and content. Continued gambling is a fact easily recognized. The independent review and judgment of a future motion picture which might contain acts which considered with the other elements of obscenity may be obscene, however, is not a fact of easy establishment. To allow contempt action or to even permit an injunction which would stop the future distribution or exhibition is a prior restraint and one that should not be permitted under the First Amendment.

It is capable of sweeping or chilling the nonobscene as well as the obscene. To urge that the distribution of obscene material is illegal and, therefore, is a public nuisance is a circular argument. It begs the question of whether traditional nuisance regulation is consistent with First Amendment rights. It is one thing to abate gambling, filthy food and another to abate the sale of filthy books or motion pictures. Food is not protected by the First Amendment, neither is liquor or prostitution. The practical operation of such a statute is a serious prior restraint.

4. The *En Banc* Decision of the Fifth Circuit be Affirmed that any Statute Which Would Authorize a One-Year Closure Order Against an Establishment Found to be a Nuisance Because of Commercial Obscenity, Unless a Penal Bond of Up to $5,000 is Posted to Insure Against Future Violations of the Nuisance Laws is Unconstitutional Under the First and Fourteenth Amendments as applied to Film Exhibitors Because the Law Authorizes the Imposition of a Prior Restraint Against the Future Exhibition of any Film, Whether Obscene or Not, Upon a Finding That Obscene Films Have Been Exhibited in the Past.

The State of Texas in its brief and in the Jurisdictional Statement conceded that the mandatory closing of premises under a nuisance statute would be unconstitutional as applied to the motion picture houses or book stores.

The Fifth Circuit, as a precautionary matter, determined that if the closing and bond provisions of the nuisance law could be applied, that this would be an impermissible pior restraint since the State would be enjoining the future operation of a business which disseminates presumptively First Amendment protected material solely on the basis of the nature of the materials which were sold in the past. The Fifth Circuit in its opinion cites numerous cases in which the bond and closing provisions were found unconstututional when applied to First Amendment protected materials or that such a remedy was not applicable under the statute. See *Universal Amusements Company, Inc.* v. *Vance,* 587 F.2d 159, footnote 13.

Courts have said such a remedy of closing a theatre creates an *in terroram* effect, a draconian effect, and the effect of sledge hammering the printing press, the camera and all the tools of expression in every medium. Licensing statutes are analogous to a public nuisance statute since the revocation of a license to do business would stop the showing of all motion pictures whether protected or not or the sale of all books. Licensing cases also would support the proposition that such a public nuisance scheme, similar to licensing, is a prior restraint. See *Jodbor Cinema, Ltd.* v. *Sedita,* 309 F.Supp. 868; *Oregon Book Mart Corporation* v. *Schrunk, et al.,* 321 F.Supp. 639; and *Seattle* v. *Bittner,* 505 P.2d 226 (Wash. 1973).

While the Fifth Circuit interpreted the Texas statute as not permitting the bond or penal provisions to be applicable to injunctions against obscenity, this Court should be aware from the numbers of cases that state and local officials have attempted to use this obviously unconstitutional provision. We respectfully request, therefore, that the Court take note of this holding by the Fifth Circuit and affirm that the use of closure provisions, bonds and other matters under a public nuisance or Red Light Abatement statute would be clearly a prior restraint not permissible under the First and Fourteenth Amendment.

5. Appellee and the Prevailing Party Is Entitled to An Award of Attorneys' Fees.

The appellee sought a remand for a determination and award of costs and attorneys' fees as authorized by the Attorneys' Fees Award Act of 1976 which revised 42 U.S.C. §1988 to permit award of legal expenses to prevailing parties in suits brought under the Civil Rights Act, 42 U.S.C. §1981-86. The Fifth Circuit Court of Appeals determined that attorney's fees and costs should be awarded and accordingly remanded the case to the managing judge of the district court with directions to set reasonable attorney's fees in accordance with the standards established in *Johnson* v. *Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974).

Appellee contends that pursuant to said statute as held constitutional in *Hutto* v. *Finney,* U.S. , 98 SCt. 2565, 57 L.Ed.2d 522 (1978), and other cases, that the cause should be remanded for the district court to determine the total award, including an award for reasonable attorney's fees in this Court. Although not mentioned in the Brief, the State of Texas in the Jurisdictional Statement, contends the State by the consolidation of the case was forced into areas of litigation not originally contemplated. Appellee believes that the State of Texas should be responsible for the fees and that upon remand of the determination of this question, that the appellee should be awarded reasonable attorney's fees and costs. There is certainly a substantial saving of legal costs in that only three of the twenty cases were heard. That portion of the decision of the Fifth Circuit applicable to *Dexter* v. *Butler,* granted attorney's fees to the appellee and remanded the cause for determination of the amount. Certiorari was denied by this Court.

Appellee sees no difficulty in this Court remanding the cause for award to the appellee as prevailing party of reasonable attorney's fees and costs.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed and the cause remanded to the managing judge of the District Court for award of attorney's fees and costs to the appellee.

Respectfully submitted,

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APPENDIX.

APPENDIX

Rule 680. **Temporary Restraining Order**

No temporary order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the Clerks's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Rule 681. **Temporary Injunctions: Notice**

No temporary injunction shall be issued without notice to the adverse party.

Rule 683. **Form and Scope of Injunction or Restraining Order**

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 692. **Disobedience**

Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ; or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct.

Art. 1911a. **Contempt; power of courts; penalties**

Inherent power and authority of courts

Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

Penalties for contempt

Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court.

(b) A justice court or municipal court may punish by a fine of not more than $100, or by confinement in the county or city jail for not more than three days, or both, any person guilty of contempt of the court.

(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

Confinement to enforce order

Sec. 3. Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order.